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91-1788

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

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FRED W. ALLNUTT, SR.
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

****

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

****

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Dated: April 24, 1992

QUESTIONS PRESENTED FOR REVIEW

I. Is the federal income tax regulation codified at Title 26, Code of Federal Regulations, section 1.6091-2, an "information collection request" within the scope of the Paperwork Reduction Act of 1980 and its regulations, and must it thus display an O.M.B. control number?

II. If this regulation is such an "information collection request," may the United States Tax Court impose penalties upon one who ignores this regulation which does not display an O.M.B. control number, or is the imposition of such penalties proscribed by 44 U.S.C., section 3512?

1. The style of this case as shown on the front cover of this Petition contains the names of all parties to this cause.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Fred W. Allnutt, Sr. (herein "Allnutt"), hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion affirming the decision of the United States Tax Court was entered on February 26, 1992, and was not published; see *Allnutt v. Commissioner*, __ F.2d __ (4th Cir., 1992). Petition for rehearing was timely filed, but was denied on March 25, 1992. The unpublished opinion of the Court of Appeals appears in the Appendix hereto at -1-.

The opinion of the United States Tax Court from which appeal was taken to the Court of Appeals was published; see *Allnutt v. Commissioner*, 61 T.C.M. 1636 (1991). That published opinion of the Tax Court appears in the Appendix hereto at -3-.

JURISDICTION

The judgment sought to be reviewed by this petition was entered in the United States Court of Appeals for the Fourth Circuit on February 26, 1992. The jurisdiction of this Court regarding this petition is established pursuant to Title 28, U.S. Code, section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED IN CASE

Title 26, U.S. Code, section 6091:

"Place for filing returns or other documents.

"(a) General rule.-- When not otherwise provided for by this title, the Secretary shall by regulations prescribe the place for the filing of any return, declaration, statement, or other document, or copies thereof, required by this title or by regulations.

"(b) Tax returns.-- In the case of returns of tax required under authority of part II of this subchapter -

(1) Persons other than corporations.-

(A) General rule.- Except as provided in subparagraph (B), a return (other than a corporation return) shall be made to the Secretary-

(i) in the internal revenue district in which is located the legal residence or principal place of business of the person making the return, or

(ii) at the service center serving the internal revenue district referred to in clause (i),

"as the Secretary may by regulations designate."

Title 26, C.F.R., section 1.6091-2:

"Except as provided in [section] 1.6091-3 (relating to income tax returns required to be filed with the Director of International Operations) and [section] 1.6091-4 (relating to exceptional cases)-

"(a) Individuals, estates, and trusts.-

(1) Except as provided in paragraph (c) of this section,

income tax returns of individuals, estates, and trusts shall be filed with the district director for the internal revenue district in which is located the legal residence or principle place of business of the person required to make the return, or, if such person has no legal residence or principle place of business in any internal revenue district, with the District Director at Baltimore, Maryland 21202.

(2) An individual employed on a salary or commission basis who is not also engaged in conducting a commercial or professional enterprise for profit on his own account does not have a 'principle place of business' within the meaning of this section.

"(b) Corporations.- Except as provided in paragraph (c) of this section, income tax returns of corporations shall be filed with the district director for the internal revenue district in which is located the principle place of business or principle office or agency of the corporation.

"(c) Returns filed with service centers.- Notwithstanding paragraphs (a) and (b) of this section, whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions."

Title 44, U.S. Code, section 3502:

"(4) the term 'collection of information' means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either-

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities,

or employees of the United States; or..."

"(11) the term 'information collection request' means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information."

Title 44, U.S. Code, section 3504:

"(c) The information collection request clearance and other paperwork control functions of the Director shall include--

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

(3) ensuring that all information collection requests-

(A) are inventoried, display a control number and, when appropriate, an expiration date;

(B) indicate the request is in accordance with the clearance requirements of section 3507; and

(C) contain a statement to inform the person receiving the request why the information is being collected, how it is to be used, and whether responses to the request are voluntary, required to obtain a benefit, or mandatory."

Title 44, U.S. Code, section 3507:

"(f) An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request."

Title 44, U.S. Code, section 3508:

"... To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information."

Title 44, U.S. Code, section 3512:

"Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

Title 5, C.F.R., section 1320.4:

"(a) An agency shall not engage in a collection of information without obtaining Office of Management and Budget (OMB) approval of the collection of information and displaying a currently valid OMB control number and, unless OMB determines it to be inappropriate, an expiration date."

Title 5, C.F.R., section 1320.5:

"(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failure to comply with any information collection request if the request does not display a currently valid OMB control number...
"(b) Notwithstanding any other provision of law, no person shall be subject to any penalty for failure to comply with any collection of information requirement if the requirement has been disapproved by OMB,...
"(d) Whenever a member of the public is protected from

the imposition of a penalty under this section for failure to comply with a collection of information, such penalty may not be imposed by an agency directly, by an agency through judicial process, or by any other person through judicial or administrative process."

Title 5, C.F.R., section 1320.7:

"(l) 'Information collection request' means the method by which an agency communicates the specifications for a collection of information to potential respondents, including a written report form, application form, schedule, questionnaire, oral communication, reporting or recordkeeping requirement, or other similar method.
"(s) 'Reporting requirement' means a requirement imposed by an agency on persons to provide information to another person or to the agency."

STATEMENT OF THE CASE

On February 7, 1989, the Internal Revenue Service District Director for the Baltimore, Maryland, District issued to Allnutt a statutory notice of deficiency for federal income taxes covering the years 1981 through 1986. Pursuant to Title 26, U.S.C., section 6213, Allnutt filed on May 5, 1989, a petition with the United States Tax Court seeking a redetermination of the tax deficiencies and related civil penalties so proposed against him by the Baltimore District Director. In that petition, Allnutt specifically raised the assertion that certain federal income tax regulations within Title 26, C.F.R., failed to comply in very important respects with the mandates of the Paperwork Reduction Act of 1980, 44 U.S.C., sections 3501, et seq. (herein "PRA").

The thrust of the Commissioner's position in the Tax Court was that Allnutt had failed to file federal individual income tax returns for the years 1981 through 1986, and that as a consequence, the Commissioner was authorized by law to assess both the taxes due for these years as well as "failure to file and pay" penalties sanctioned by the tax code. While Allnutt raised in the Tax Court various objections under the PRA, his most dispositive effort attacking the imposition of the questioned civil penalties was made via his cross motion for summary judgment filed on November 28, 1990. In that motion, Allnutt showed that his purported duty to file federal income tax returns arose by operation of the tax regulation at 26 C.F.R., section 1.6091-2. Further, he asserted that this regulation, clearly calling for the "reporting of information," was subject to the strictures of the PRA. But, since this regulation failed to comply with the statutory and regulatory requirements of the PRA regarding the display of OMB control numbers within the text of the regulation itself or as a technical

amendment to the regulation,[1] Allnutt argued that he was authorized by law to "ignore with impunity this 'bootleg' request," and could not be as a result subjected to the penalties which the Commissioner sought in the proceedings before the Tax Court. In the Tax Court's order granting judgment in favor of the Commissioner dated January 14, 1991, that Court simply refused to address the PRA issue raised by Allnutt. Notice of appeal to the United States Court of Appeals for the Fourth Circuit was timely filed, and that Court's jurisdiction to hear that appeal was derived from 26 U.S.C., section 7482.

In the appellate court, Allnutt argued that many prior decisions of both the Fourth and other Circuits conclusively held that the duty to "file" tax returns was governed by 26 U.S.C., section 6091, which itself depended upon the promulgation of regulations for its enforcement; see *United States v. Calhoun*, 566 F.2d 969 (5th Cir., 1978), and *United States v. Garman*, 748 F.2d 218 (4th Cir., 1984). Further, Allnutt noted the recent decisions regarding the operation of the PRA, such as this Court's decision in *Dole v. United Steelworkers of America*, __ U.S. __, 110 S.Ct. 929 (1990), and the appellate cases of *United States v. Smith*, 866 F.2d 1092 (9th Cir., 1989), *United States v. Hatch*, 919 F.2d 1394 (9th Cir., 1990), and *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77 (D.C. Cir., 1991), which clearly held that agency regulations mandating the provision of information to an agency were within the scope of the PRA and were required to comply therewith. Based upon these premises, Allnutt argued that the Court of Appeals was required to make the determination as to whether the subject regulation, 26 C.F.R., section 1.6091-2, required a member of the public

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[1] See Title 5, C.F.R., section 1320.7(f)(2).

to "report information" to a federal agency and was thus within the scope of the PRA. If the Court found that the subject regulation did so require, which it obviously does, it was next required to determine whether this regulation did in fact display a control number as mandated by the PRA. If the regulation did not, and if the penalties in question were inextricably connected to the duty described within the regulation, the Court was required to vacate those penalties sought by the Commissioner and judicially imposed by the Tax Court as being proscribed by the Public Protection Clause of the PRA, 44 U.S.C., section 3512.

Notwithstanding the fact that this Court in *Dole* mandated such analysis when a court was confronted with the issue of whether an agency "request for information" was within the scope of the PRA, the Court of Appeals, as did the Tax Court, carefully avoided addressing the issue. Instead, the Court of Appeals simply, in a very short opinion, concluded as follows:

> "After careful review of the record, briefs of counsel, and the decision of the tax court, we find Allnutt's arguments without merit. Therefore, we affirm on the reasoning of the tax court."

The error of the Court of Appeals is readily apparent. Its own decisional law, as well as that of other Circuits, has already identified the subject regulation as indeed the one which defines the duty of a domestic American citizen to submit information to the Internal Revenue Service. As such, there is absolutely no question that this regulation is clearly a "collection of information," an "information collection request," a "reporting requirement," and a "collection of information requirement," within the parameters of and subject to the PRA. Such being the case, the absence of a control

number for this regulation therefore brings into play the "Public Protection Clause" of the act. The analysis required by this Court's decision in *Dole* as to whether the "request" complied with the PRA was eschewed by the Court of Appeals in an effort to protect the agency in question rather than to protect an express statutory right clearly granted by Congress to the American public after full and complete debate thereon. The PRA in express terms has plainly authorized members of the American public to "regulate the regulators" by deliberately failing to provide to an agency information via an "information collection request" which bears no evidence of compliance with the PRA, i.e, the display of a control number upon the face of the request. This is a statutory right which has already been acknowledged to exist in this Court's decision in *Dole,* and which has been enforced in the cases of *United States v. Smith, United States v. Hatch*, and *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, supra. The Court of Appeals has decided, however, that this statutory right manifest within the legislative history of the PRA and its plain text is nugatory after all and the American public had really better comply with the unauthorized whims and fancies of the regulators rather than take legislatively sanctioned actions. In essence, the Court of Appeals has sanctioned a "due process" violation of the worst sort.[2]

For the reason that the Court of Appeals has rendered an opinion in serious conflict with the decisions of other appellate courts as well as this Court, and has sanctioned the departure by itself as well as the Tax Court from the accepted and usual course of judicial proceedings, review of that decision by this Court via this petition should be granted.

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[2] See *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

REASONS FOR GRANTING THE WRIT

The PRA clearly grants to members of the American public the statutory right to refuse to answer and provide information to a federal agency made via a request which does not comply with that act. While this right has been acknowledged to exist within a line of cases which includes a decision of this Court, a conflicting and opposing line of cases denigrates and renders void such right. But, only one line or the other may prevail and the two conflicting positions cannot continue to exist simultaneously. For this reason, this petition should be granted.

LEGISLATIVE HISTORY OF PRA

President Roosevelt commissioned the Central Statistical Board to study the problem of governmental paperwork on May 16, 1938,[3] and the Board's study thereafter became the basis for the Federal Reports Act of 1942 (herein "FRA"),[4] which constituted the first attempt by Congress to regulate the information collection activities of federal agencies. The FRA granted authority to the Bureau of the Budget to approve the requests of federal agencies seeking to collect

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[3] S. Rep. No. 479, 77th Cong., 1st Sess., (1941). The Central Statistical Board later became a part of the Bureau of the Budget, whose name was eventually changed to the Office of Management and Budget ("OMB").

[4] P.L. 77-831, 56 Stat. 1078 (1942), codified at 44 U.S.C., sections 3501, et seq. (1981).

information,[5] and it prohibited any federal agency from engaging in such conduct if the Director did not approve the proposed collection of information.[6] The act granted rule making authority necessary for its implementation,[7] and on February 13, 1943, such rules were promulgated.[8] These rules clearly encompassed both forms used by federal agencies to collect information as well as agency regulations.

A weak attempt to strengthen the FRA was made in 1973,[9] and revisions to Circular No. A-40 which implemented the FRA were made on May 3, 1973, and again on February 10, 1976, and November 5, 1976. In late 1974, Congress established a Commission on Federal Paperwork and directed it to study and report needed changes for laws, regulations and procedures to insure that information essential for the functioning of federal agencies was obtained with a minimal amount of burden, duplication and cost.[10]

On October 3, 1977, after lengthy and careful study of the matter of paperwork requirements mandated

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[5] 44 U.S.C., section 3509 (1976).

[6] 44 U.S.C., sections 3506, 3509(2) (1976).

[7] 44 U.S.C., section 3510 (1976).

[8] Circular No. A-40, having application solely to federal agencies, was never published within the Federal Register. These regulations and subsequent amendments were effective until March 31, 1983, when regulations for the PRA were adopted.

[9] See P.L. 93-153, 87 Stat. 576, section 409 (1973).

[10] See P.L. 93-556, 88 Stat. 1789 (1974), codified at 44 U.S.C., section 3501 (1982).

by federal agencies, the Federal Paperwork Commission submitted the last of its many reports.[11] This Report concluded that while the existing FRA seemed sufficient to control the use of forms by federal agencies to collect information, it was insufficient to control the source for the use of such forms, i.e., agency regulations.[12] Prior to this report, it had been suggested that Congress clarify and strengthen the FRA "to allow the clearance agency to challenge the need for regulatory information."[13] The Commission readily perceived that changing the rule making process of federal agencies was essential to reduce paperwork burdens:

> "Rulemaking is, in essence, legislation by executive departments and agencies. Agency rules and regulations have the full force and effect of law, and translate broad congressional mandates into operational programs and practices.
>
> "Most of the specific reporting and recordkeeping requirements imposed on the public stem from such rules and regulations."[14]

Still later, another report concluded as follows:

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[11] A Report of the Commission on Federal Paperwork, Final Summary Report (Oct. 3, 1977).

[12] Id., at 606.

[13] Report of the Comptroller General, "Status of GAO's Responsibilities Under the Federal Reports Act," May 28, 1976, at 20.

[14] Final Report, at 613.

> "The Act is not clear on its coverage of a major portion of the paperwork burden--recordkeeping requirements-- although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines... Not all agencies covered by the Federal Reports Act comply fully with its requirements.
>
> "For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine."[15]

While legislation was proposed in 1976 to address the problem of federal paperwork burdens, it was not until 1979 that a major effort was undertaken in this respect. In hearings upon this bill introduced in the Senate, Senator Lawton Chiles stated:

> "While OMB is required to supervise the approval or disapproval of agency requests within 60 days, individuals, businesses, and State and local governments will be told

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[15] The Reports Clearance Process, A Report of the Commission on Federal Paperwork 43 (1977).

> they do not need to answer requests not acted upon by OMB.
>
> "Forms without an OMB number on them will be 'bootleg forms' that the public can ignore."[16]

And while Senator Chiles stated the purpose of the proposed legislation, Senator Lloyd Bentson explained some of the problems the legislation was to address:

> "Each of these reporting requirements, all of which have been approved by either OMB or GAO under the provisions of the Federal Reports Act, creates an average of ten separate forms-- and the staff at the GAO reported finding one OMB-approved reporting requirement that actually created 90 separate forms."[17]

And Senator Bentson's sentiments in this regard were echoed by Gerald L. Hegel, of the Association of Records Managers and Administrators:

> "The Federal Paperwork Commission addressed the issue of statutory recordkeeping and reporting requirements and found that, not statutes, but agency rules and regulations comprised the bulk of the paperwork burden. For example, in the

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[16] Paperwork and Redtape Reduction Act of 1979: Hearing before the Subcomm. on Governmental Affairs, at 12, 96th Cong., 1st Sess., (1979).

[17] Id., at 131, 132.

> Occupational Safety and Health Act, there are five references to reports from employers, but the Commission identified more than 400 reporting and recordkeeping references in OSHA regulations. Bear in mind that OSHA is not an isolated example."[18]

The Paperwork Reduction Act of 1980[19] as it was finally passed by both Houses of Congress was essentially the FRA rewritten to encompass stronger features. In section 3504(c) thereof, the OMB Director was expressly given the authority to review and approve the "information collection requests" of all federal agencies. Via section 3507(a), agencies were mandated to submit to OMB for its review and approval each and every "collection of information," and pursuant to section 3507(f), the same agencies were prohibited from collecting the information in the absence of an OMB control number displayed upon the request, which number was the indicator to the public that the request had been approved by OMB. But, the "teeth" within the act was the "Public Protection Clause" embodied within section 3512, which expressly stated that no agency could impose any penalty of any kind upon anyone refusing to provide information pursuant to an unapproved "information collection request." And precisely what was an "information collection request" was clearly defined within section 3502 of the act.

The Public Protection Clause of the PRA was intentionally designed to enlist the support of the American public in helping OMB secure compliance with

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[18] Id., at 165.

[19] P.L. 96-511, 94 Stat. 2812 (1980).

the commands thereof by the federal agencies. This was repeatedly stated in the many reports on this legislation, but was stated best by President Carter when he signed the bill on December 11, 1980:

> "The act I'm signing today will not only regulate the regulators, but it will also allow the President, through the Office of Management and Budget, to gain better control over the Federal Government's appetite for information from the public. For the first time it allows OMB to have the final word on many of the regulations issued by our Government. It also ensures that the public need not fill out forms nor keep records which are not previously approved by OMB."[20]

There can thus be no dispute that this act by clear legislative intendment and express statutory provision was specifically designed to afford the American public a statutory right to refuse to provide to a federal agency information which had not been approved by OMB. And approval was to be demonstrated by the proper display upon the request of a control number. And this right to refuse to provide information not approved by OMB could be exercised without running the risk of the imposition of penalties of any kind, civil or criminal.

THE PREVAILING LINE OF AUTHORITY

Acknowledgment of the existence of this statutory right occurred in this Court's decision in *Dole v. United*

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[20] Presidential Documents, Administration of Jimmy Carter, December 11, 1980, at 2795.

Steelworkers of America, ___ U.S.___, 110 S.Ct. 929 (1990). When the regulations for the PRA were first adopted in March, 1983, those rules required federal agencies to submit to OMB not only those "information collection requests" whereby information was to be submitted directly to the agencies, but also those requests concerning the provision of information to parties other than the federal agencies. These latter type of "disclosure" regulations were at issue here in *Dole*, and of course this Court held that OMB did not have authority over such disclosure rules. But, in making this decision, this Court was required to define precisely what types of "information collection requests" were within the authority of OMB:

> "The common-sense view of 'obtaining or soliciting facts by an agency' is that the phrase refers to an agency's efforts to gather facts for its own use and that Congress used the word 'solicit' in addition to the word 'obtain' in order to cover information requests that rely on the voluntary cooperation of information suppliers as well as rules which make compliance mandatory," Id., at 934.
>
> "If 'reporting and recordkeeping requirement' is understood to be analogous to the examples surrounding it, the phrase would comprise only rules requiring information to be sent or made available to a federal agency....," Id., at 935.
>
> "When OMB approves an information collection request, it issues a control number which is placed on all forms. If a request does not receive OMB approval, it

> is not issued a control number and the agency is prohibited from collecting the information... In addition, if the agency nevertheless promulgates the paperwork requirement, members of the public may ignore it without risk of penalty... However, this protection of the public is applicable only to information gathering rules," Id., at 937.
>
> "[T]he public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information *for an agency* or provide information *to an agency*," Id., at 937.

Since the tax regulation at 26 C.F.R., section 1.6091-2, is clearly one of the "information gathering rules" noted in *Dole*, it should be approved by OMB and display a control number, the absence of which would trigger the protection offered to the public via section 3512.

One of the first substantive appellate decisions acknowledging the statutory right of the public to "regulate the regulators" is *United States v. Smith*, 866 F.2d 1092, 1098, 1099 (9th Cir., 1989). Here, a miner working upon federal lands was charged with and convicted of failing to submit to the Forest Service a "Plan of Operations" commanded by a Forest Service regulation published at 36 C.F.R., section 228.4; and this regulation dictated that such "Plan" should be submitted to "the District Ranger." The Court of Appeals noted that neither the form or regulation in question displayed a control number required by the PRA and its regulations. In defining the parameters of the PRA, that Court held:

> "This definition encompasses agency regulations that require disclosure of information to the government and that call for the disclosure or reporting of information through answers to standardized (identical) questions."

Here, the Ninth Circuit reversed Smith's conviction as being the imposition of an impermissible penalty proscribed by section 3512.

Within a month of the decision in *Smith*, the PRA defense was pleaded in another case also involving a miner upon federal lands who was similarly being charged with a failure to submit a "Plan." On appeal from the conviction in that case, the Court, in *United States v. Hatch*, 919 F.2d 1394 (9th Cir., 1990), held that compliance with the PRA was a jurisdictional prerequisite to the imposition of criminal penalties. Since the regulation at issue in *Hatch* likewise failed to display a control number, the conviction was reversed.

In *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77 (D.C. Cir., 1991), at issue was a regulation promulgated by the Department of Health and Human Services requiring regulated entities to make available to the agency upon request certain "self evaluation reports." Here, the Court concluded that even this regulation which only indirectly required that information eventually be made available to an agency was within the scope of the PRA and subject to OMB approval.

The principle of law which manifests itself within the four cases noted above may be succinctly stated. As this Court concluded in *Dole*, a regulation subject to the PRA is one which commands that information be provided ultimately to a federal agency. The decision in *Action Alliance* expands the definition of those regulations within the scope of the PRA as those which mandate availability

of information to an agency. And both *Smith* and *Hatch* demonstrate the consequence of the failure of a regulation subject to the PRA to display a control number: no civil or criminal penalty for a violation of the regulation may be imposed.

It seems abundantly clear that the tax regulation at 26 C.F.R., section 1.6091-2, fully meets the test of what type of agency regulation is within the scope of the PRA. The underlying statute, 26 U.S.C., section 6091, by its plain language, entirely depends upon regulations for its implementation.[21] And the regulation itself calls for the provision of a tax return (obviously a document containing standardized questions) directly to an agency: one must submit such tax return to either a District Director or a Service Center. Logic compels the conclusion that this regulation is indeed an "information collection request" within the scope of the PRA.

But, one need not rely upon logic to reach this conclusion as the various appellate courts have already declared that such is the case. For example, in *United States v. Calhoun*, 566 F.2d 969, 973 (5th Cir., 1978), and *United States v. Garman*, 748 F.2d 218, 219 (4th Cir., 1984), this regulation was identified as the source for the duty to file a tax return, and this conclusion is supported by many other cases.[22] It therefore seems self evident

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[21] See *United States v. Mersky*, 361 U.S. 431, 437, 438 (1960).

[22] See *United States v. Griffin*, 814 F.2d 806, 810 (1st Cir., 1987); *United States v. Citron*, 221 F.Supp. 454, 456 (S.D.N.Y., 1963); *United States v. Gilkey*, 362 F.Supp. 1069, 1071 (E.D. Pa., 1973); *United States v. Ramantanin*, 452 F.2d 670, 671 (4th Cir., 1971); *United States v. Lawhon*, 499 F.2d 352, 355 (5th Cir., 1974); *United States v. Quimby*, 636 F.2d 86, 90 (5th Cir., 1981); *United States*

that if the appellate courts have identified this regulation as the one governing the duty to file, it surely is an "information collection request" within the terms of the PRA.

And it is equally certain that this regulation fails to display any OMB control number. The regulations for the PRA command the display of control numbers for agency regulations "in the Federal Register (as part of the regulatory text or as a technical amendment);" see 5 C.F.R., section 1320.7(f)(2). While several of the tax regulations for the income tax do display control numbers within the text of the regulations themselves, this one does not.

But, while this and other tax regulations do not display within their text such control numbers, the Internal Revenue Service has published a tabular list of the control numbers assigned to tax regulations within 26 C.F.R., Part 602. Section 6091 of the Internal Revenue Code is the statutory foundation for some eight regulations and this tabular list shows the various control numbers which have been assigned to the regulations under section 6091:

Section 6091 Regulations:	Part 602 Control Number:
1.6091-1	None
1.6091-2	None
1.6091-3	1545-0089
1.6091-4	None
20.6091-1	1545-0015

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v. Rice, 659 F.2d 524, 526 (5th Cir., 1981); *United States v. Gorman*, 393 F.2d 209, 213, 214 (7th Cir., 1968); *United States v. Grabinski*, 727 F.2d 681, 684 (8th Cir., 1984); *United States v. Clinton*, 574 F.2d 464, 465 (9th Cir., 1978); and *United States v. Dawes*, 874 F.2d 746, 750 (10th Cir., 1989).

25.6091-1	1545-0020
31.6091-1	1545-0028
	1545-0029
301.6091-1	None

It is obvious upon examination of Part 602 that section 6091 regulations are understood by the Internal Revenue Service as being within the scope of the PRA, yet for the very important regulation at section 1.6091-2, there is no control number which has been assigned to it.

The principle of law expressed in the decisions of *Dole, Action Alliance, Smith* and *Hatch* fully supports the position maintained by Allnutt: (1) section 1.6091-2 calls for the reporting of tax information to the Internal Revenue Service and is thus an "information collection request" within the scope of the PRA; (2) this regulation fails to display a control number, which means that OMB has not approved it as a method of collecting information; (3) Allnutt was within his rights to ignore this request; and (4) the questioned civil penalties for ignoring this unapproved request cannot be imposed.

THE OPPOSING LINE OF AUTHORITY

As a result of the development of the above legal principle, a variety of defendants charged with the commission of tax crimes relating to the non-filing of tax returns have recently sought to have this principle applied to their cases as a defense. But, notwithstanding the inherent logic in applying this rule to the income tax and its forms, instruction booklets, and regulations, the appellate courts have refused to do so.

In *United States v. Bentson*, 947 F.2d 1353 (9th Cir., 1991), and *United States v. Hicks*, 947 F.2d 1356 (9th Cir., 1991), those defendants sought to apply the *Dole-Smith-Hatch* rule to the instruction booklet for tax form 1040. But here, the very same Circuit which created the

Smith-Hatch rule denied such challenges by the use of specious logic and semantics ("The PRA was not meant to provide criminals with an all-purpose escape hatch... If, in enacting the PRA, Congress had intended to repeal 26 U.S.C., [section] 7203, it could have done so explicitly;" see *Hicks*, 947 F.2d, at 1359).

As noted previously in footnote 22, the decision in *United States v. Dawes*, 874 F.2d 746, 750 (10th Cir., 1989), concluded that the duty to file a tax return was governed by section 6091 of the tax code and its regulations. In the second appeal of this case, *United States v. Dawes*, 951 F.2d 1189, 1192 (10th Cir., 1991), that court was confronted with the PRA issue being raised by these convicted tax crime defendants. Here, notwithstanding its prior decision in the same case, the Tenth Circuit declared that income tax regulations "simply assist taxpayers to complete tax forms" and "are subsidiary to and mere administrative appendages of the tax form. They function only to aid the taxpayer in providing the information required by the 1040 form." For this reason, the *Dawes* court concluded that tax regulations don't need OMB control numbers. This is indeed a very amazing proposition considering the multitude of cases decided over the near 80 year existence of the federal income tax wherein very careful distinctions have been made that some tax regulations are "legislative rules" and others are interpretive.

In *United States v. Burdett*, 768 F.Supp. 409, 413 (E.D.N.Y., 1991), that District Court squarely rejected the *Smith-Hatch* rule and declared that the penalty proscribed by section 3512 of the PRA was only a civil penalty and not a criminal one. And in *United States v. Neff*, 954 F.2d 698, 699 (11th Cir., 1991), when that Court was confronted with the identical argument raised herein by Allnutt, it rejected its own as well as the decisional law of other Circuits and suddenly declared that section 6012 of the Internal Revenue Code governed the duty to

file tax returns; the Court reasoned that since it had now declared that a statute and not a regulation governed the duty to file, Neff's PRA argument was meritless.

The rationale of the *Bentson-Hicks-Dawes-Neff* rule regarding the application of the PRA to income tax forms, booklets, and regulations was implicitly accepted by the Court of Appeals when it rejected Allnutt's arguments in its opinion of February 26, 1992. As a consequence, there now exists two widely divergent, conflicting and diametrically opposed rules regarding the application and construction of the PRA. On the one hand, the *Dole-Action Alliance-Smith-Hatch* rule declares that the PRA applies without exception to "information gathering rules" which must display control numbers to be effective as "information collection requests." On the other hand, there is the precisely opposite *Bentson-Hicks-Dawes-Neff* rule which declares for a multitude of conflicting reasons that the PRA simply does not apply to the federal income tax. Those various reasons are that the income tax laws and regulations predate the PRA, that Congress could not have intended to repeal the tax crime statutes, that the PRA does not apply to criminal penalties, that tax regulations merely interpret the tax forms, and that, notwithstanding previous decisions, it is section 6012 of the code that commands the filing of returns and not section 6091 and its regulations.

NECESSITY TO RESOLVE CONFLICT

If these two conflicting and opposing rules regarding the construction of the PRA are left standing in the condition they are in today, the future promises only uncertainty and utter confusion as well as the loss of a statutory right granted by Congress. The Congress did not enact the PRA with any other intent than that it should be construed with a clear and purposeful meaning; it further intended that its purpose should be achieved

and paperwork burdens reduced. But, this divergence of construction of the PRA will not further this Congressional objective, and the *Bentson-Hicks-Dawes-Neff* rule only promises an ongoing effort to avoid applying the PRA in the manner intended by Congress. In any event, one line of authority or the other must be permanently interred.

But, the above erroneous decisions constituting the *Bentson-Hicks-Dawes-Neff* line of authority are capable of explanation. As noted in the first pages of this petition, the PRA grants to members of the American public the statutory right to refuse to provide information to federal agencies if the request in question fails to comply with the PRA. Here, the Internal Revenue Service and the Treasury Department, both of whom vehemently opposed the PRA's enactment,[23] have followed through with their original designs to frustrate implementation of the PRA. And these big, powerful federal agencies with armies of lawyers in tow march into trial and appellate courts knowing their deficient compliance with the PRA and make arguments daring the appellate courts to question their conduct. Needless to say, those courts have tacitly acceded to such conduct, the net result of which has been the utter destruction of a statutory right Congress gave to the little man on the street.

And this sanctimonious, "holier than thou" attitude of the Internal Revenue Service is surely setting an example for other federal agencies, if the Internal Revenue Service is not just simply following the example set by others. For instance, at the beginning of this petition, it was shown that the FTC and SEC refused and dodged compliance with the FRA on the grounds that the statutes they administered simply could not be subjected to the clearance process. Has their attitude changed at

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[23] See 48 Fed. Reg. 13666, 13667 (March 31, 1983).

all with the enactment of the PRA?

Today, the SEC has realized that it must comply with the PRA and has published control numbers for its many regulations subject to the PRA in a tabular list found at 17 C.F.R., section 200.800; yet the OMB approval for many of these regulations has expired. In reference to the FTC, its regulations contain a number of reporting and recordkeeping requirements, yet of this number, only three display control numbers; see 16 C.F.R., sections 1204.17, 1610.40, and 1615.35. The conflicting line of case authority noted above simply will provide no impetus for these agencies to comply with the PRA. And surely Congress did not intend that agencies not comply. The only way to have the PRA enforced as intended by Congress is to grant certiorari in this case and reverse the decision of the United States Court of Appeals for the Fourth Circuit.

CONCLUSION

For the reasons expressed above, this Court should hear this case and grant certiorari.

Respectfully submitted,

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205-533-2535

Counsel of Record for
Fred W. Allnutt, Sr.,
Petitioner

April 24, 1992

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRED W. ALLNUTT, SR.,
Petitioner-Appellant,

v. No. 91-1073

COMMISSIONER OF
INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the United States Tax Court.
Judge Halpern, Tax Court Judge.
(Tax Ct. No. 9225-89)

Submitted: November 20, 1991

Decided: February 26, 1992

Before RUSSELL and NIEMEYER, Circuit Judges, and
CHAPMAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Lowell H. Becraft, Jr., Huntsville, Alabama, for Appellant. Shirley D. Peterson, Assistant Attorney General, Gary R. Allen, Robert S. Pomerance, Curtis C. Pett, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Fred W. Allnutt, Sr. appeals from the decision of the tax court finding him liable for penalties for failure to pay estimated taxes, civil fraud, and pursuing a frivolous proceeding in tax court. I.R.C. [sections] 6653(b), 6654, and 6673. Allnutt contends that the imposition of these penalties is in error because the Commissioner has failed to properly comply with the Paperwork Reduction Act of 1980 and that summary judgment was improper on the issue of fraud. After careful review of the record, briefs of counsel, and the decision of the tax court, we find Allnutt's arguments without merit. Therefore, we affirm on the reasoning of the tax court. *Allnutt v. Commissioner*, Tax Ct. No. 9225-89 (U.S. Tax Ct. Jan. 18, 1991). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED.

T.C. Memo. 1991-6

UNITED STATES TAX COURT

FRED W. ALLNUTT, SR., Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 9225-89. Filed January 14, 1991.

Based on the inadequacy of the petition, the Court previously dismissed this case with regard to all issues for which petitioner bears the burden of proof, leaving only the issue of fraud to be tried or otherwise disposed of. Based on the inadequacy of petitioner's reply to respondent's answer, the Court previously deemed admitted under Rule 37(c) 42 allegations relating to fraud contained in that answer. This proceeding concerns only respondent's motions for partial summary judgment and for imposition of a penalty under section 6673 and petitioner's cross-motion for summary judgment. Held: Respondent is entitled to the addition to tax for fraud provided for in section 6653(b), having adequately pled fraud and, considering the facts deemed admitted pursuant to Rule 37(c), having carried his burden of showing by clear and convincing evidence both an underpayment and that some portion of that underpayment was due to fraud with intent to evade tax. Held further: A penalty of $25,000 is imposed under section 6673, petitioner's "tax-protestor" arguments being considered frivolous and groundless and this proceeding having been instituted primarily for delay.

Fred W. Allnutt, pro se.
Robert E. Williams, Jr., for the respondent.

MEMORANDUM OPINION

HALPERN, Judge: This matter is before us on two motions made by respondent and one motion made by petitioner. Respondent's motions are, one, for partial summary judgment and, two, for imposition of a penalty under section 6673[1]. Petitioner's motion is for summary judgment. Because of the unusual procedural history of this case, once we have disposed of those motions, we will have nothing further required of us other than to enter a decision for respondent.

Background

The procedural history of the case is as follows:

Deficiencies Determined

Respondent, by notice dated February 7, 1989, determined deficiencies in and additions to petitioner's Federal income tax as follows:

Year	Deficiency	Section 6653(b)(1)*	Additions to tax Section 6653(b)(2)**	Section 6654
1981	$285,863	$142,932	none	$21,904
1982	201,670	100,835	50% of interest due on $201,670	19,634
1983	188,514	94,257	50% of interest due on $188,514	11,536
1984	166,212	83,106	50% of interest due on $166,212	10,450

[1] Unless otherwise noted, all section references are to the Internal Revenue Code of 1954 as amended and in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure. The reference to section 6673 is to such section as amended by section 7731(a) of Pub. L. 101-239, 103 Stat. 2106, 2400 and effective for positions taken after December 31, 1989, in proceedings which are pending on, or commenced after that date.

1985	144,316	72,158	50% of interest due on $144,316	8,261
1986	951,749	713,812	50% of interest due on $951,749	45,997

* For taxable year 1981, [section] 6653(b); for taxable year 1986, [section] 6653(b)(1)(A).

** For taxable year 1981, section did not exist; for taxable year 1986, [section] 6653(b)(1)(B).

Petition

Petitioner initially filed a petition to commence this case on May 5, 1989. On June 6, 1989, respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted, alleging that the petition was based on specious, tax-protestor type arguments. We agreed and ordered petitioner to file an amended petition. Petitioner did so. The amended petition, however, failed to comply with our order and our rules of pleading. We then granted respondent's motion to dismiss with regard to all issues on which petitioner has the burden of proof and restored the case to the general docket for trial or other disposition with respect to issues on which respondent bears the burden of proof. Our order further recited that a decision would be entered as to that portion of the deficiency relating to those issues for which petitioner bears the burden of proof after trial or other disposition of those issues for which respondent bears the burden of proof.

Answer

On May 11, 1990, respondent filed an answer containing 42 allegations of fact relating to the addition to tax for fraud under section 6653(b). The answer also raised, for the first time, and as an alternative to the addition for fraud, claims for additions to tax for

negligence under section 6653(a) and for failure to file under section 6651(a)(1). Petitioner failed to file an adequate reply and, on August 22, 1990, we granted respondent's motion, made pursuant to Rule 37(c), that the undenied allegations of fact set forth in paragraphs 6, 7, and 8 of the answer be deemed admitted.

The allegations in paragraphs 6, 7, and 8 relate, respectively, to respondent's additions to tax for fraud, negligence, and failure to file. Since, today, we uphold respondent's additions for fraud, the allegations relating thereto are the only ones that we need set forth. Those allegations (the allegations of paragraph 6) are as follows:

> FURTHER ANSWERING the amended petition, and in support of the determination that the underpayment of tax which the petitioner was required to show on his income tax returns for the taxable years 1981, 1982, 1983, 1984, 1985 and 1986 is due to fraud, the respondent alleges:
>
> a. The petitioner is a United States citizen.
> b. During the years in issue and continuing through the present, the petitioner has resided in the State of Maryland.
> c. The petitioner's Social Security Number is 215-40-8255.
> d. During the years in issue, the petitioner was married.
> e. The petitioner timely filed 1979 and 1980 U.S. Individual Income Tax Returns.
> f. The petitioner did not file a U.S. Individual Income Tax Return for any of the years in issue.
> g. During the years in issue, the petitioner was self employed.

h. During the years in issue, the petitioner owned an unincorporated land excavation contracting business and also owned Fred W. Allnutt, Inc., an incorporated land excavation contracting business.

i. During the taxable year 1981, the petitioner had taxable income of $433,059.00.

j. During the taxable year 1982, the petitioner had taxable income of $409,575.00.

k. During the taxable year 1983, the petitioner had taxable income of $386,090.00.

l. During the taxable year 1984, the petitioner had taxable income of $342,223.00.

m. During the taxable year 1985, the petitioner had taxable income of $298,355.00.

n. During the taxable year 1986, the petitioner had taxable income of $1,913,176.00.

o. During the years in issue, the petitioner was subject to U.S. Individual income tax on his taxable income.

p. The petitioner failed to maintain, or submit for examination by the respondent, complete and adequate books of account and records of his income producing activities for each of the taxable years 1981, 1982, 1983, 1984, 1985, and 1986, as required by the applicable provisions of the Internal Revenue Code of 1954 and 1986, and respective regulations promulgated thereunder.

q. That the amount of the petitioner's gross taxable income, deductions and other items required to be shown on his income tax returns for each of the taxable years 1981, 1982, 1983, 1984, 1985 and 1986 cannot be determined from the books and records which the petitioner maintained and submitted for examination by the respondent, as is shown by the following facts:

1. The petitioner failed to file U.S. individual income tax returns for the years in issue.

2. The petitioner, although aware of the record keeping requirements, willfully failed to maintain or refused to provide the respondent's revenue agent with books and other records of account with respect to his income during the years at issue.

r. The respondent has determined the petitioner's correct taxable income for tax years 1981 through 1986 using the specific item method for some years and using estimates based upon arithmetical extrapolations of known income amounts for other years.

s. The petitioner had no tax withholdings and made no estimated tax payments during any of the years in issue.

t. The petitioner was the president of Fred W. Allnutt, Inc. during the years in issue.

u. The petitioner was the sole shareholder of Fred W. Allnutt, Inc. during the years in issue.

v. The petitioner had primary control over the bookkeeping and accounting functions of Fred W. Allnutt, Inc. during the years in issue.

w. Petitioner had primary control over the amount of funds disbursed to him by Fred W. Allnutt, Inc. during the years in issue.

x. Petitioner had primary control over the way in which payments made to him by Fred W. Allnutt, Inc. were characterized and accounted for during the years in issue.

y. The petitioner received payments of money by check and cash from Fred W. Allnutt, Inc. during the years in issue.

z. During the years in issue, personal expenses of the petitioner were paid by Fred W. Allnutt, Inc.

aa. The petitioner received income from Fred W. Allnutt, Inc. during the years in issue.

ab. Fred W. Allnutt, Inc. did not file with the Internal Revenue Service any Forms W-2 reflecting amounts paid to or for petitioner during the years in issue.

ac. Fred W. Allnutt, Inc. did not file with the Internal Revenue Service any Forms 1099 reflecting amounts paid to or for petitioner during the years in issue.

ad. The decision was willfully made by petitioner for Fred W. Allnutt, Inc. to not file any Forms W-2 or Forms 1099 reflecting amounts paid to petitioner during the years in issue, even though petitioner knew that Fred W. Allnutt, Inc. was required to file said forms.

ae. The Forms 1120, U.S. Corporation Income Tax Return, filed by Fred W.

Allnutt, Inc. for taxable years ending August 31, 1981; August 31, 1982; and August 31, 1983 do not reflect any compensation paid to petitioner.

af. The decision for Fred W. Allnutt, Inc. to not reflect any compensation paid to petitioner during the corporate taxable years ending August 31, 1981; August 31, 1982; and August 31, 1983 on its returns for those years was willfully made by petitioner.

ag. Fred W. Allnutt, Inc. did not file U.S. Corporation Income Tax Returns for tax years ending after August 31, 1983.

ah. The decision for Fred W. Allnutt, Inc. to stop filing Corporation Income Tax Returns was willfully made by petitioner.

ai. During all or some of the years in issue, petitioner placed a portion of his assets in trusts.

aj. The decision made by petitioner for Fred W. Allnutt, Inc. not to file Forms W-2 and Forms 1099; not to reflect compensation paid to petitioner on the corporate tax returns of Fred W. Allnutt, Inc.; and to stop filing corporate tax returns for Fred W. Allnutt, Inc., were fraudulent with the intent to evade tax.

ak. The trust created by petitioner during all or some of the years in issue used names other than the petitioner's name.

al. During all or some of the years in issue, the petitioner concealed assets by placing them in trusts with fictitious names.

am. The petitioner fraudulently failed to report his taxable income for his 1981 through 1986, inclusive, taxable years in the

amounts of $433,318.00; $409,834.00; $386,349.00; $342,482.00; $298,644.00; and $1,913,238.00, respectively, with the intent to evade the payment of taxes on such income in each respective year.

an. The petitioner's failure to maintain and produce complete and adequate records of his income producing activities for respondent in connection with the examination of his income tax returns for the taxable years 1981 through 1986; his consistent pattern of failing to file returns for taxable years 1981 through 1986; his consistent pattern of failing to report substantial amounts of income during taxable years 1981 through 1986; his manipulation of Fred W. Allnutt, Inc. to conceal compensation paid to him; his use of trusts; and his concealment of assets was fraudulent with the intent to evade tax.

ao. The petitioner failed to report his income tax liability for 1981 through 1986, inclusive, in the amounts of $285,863.00; $201,670.00; $188,514.00; $166,212.00; $144,316.00; and $951,749.00, respectively.

ap. All or part of the underpayment of tax required to be shown on petitioner's income tax returns for each of his 1981 through 1986, inclusive, taxable years is due to fraud with the intent to evade tax.

Respondent's Motions for Summary Judgment and for Imposition of a Penalty

On September 19, 1990, respondent filed motions for summary judgment and requesting imposition of a penalty under section 6673. Respondent's motion for

summary judgment requests our determination that petitioner is liable for additions to tax for fraud or, in the alternative, negligence and failure to file. On October 15 petitioner filed a response to respondent's motions. Petitioner's response addresses neither the substance of respondent's allegations of fraud, negligence, and failure to file nor petitioner's procedural difficulties resulting from the deemed admissions in respondent's answer. The response only rehashes "protestor" type arguments previously made by petitioner and rejected by this Court. Setting forth petitioner's conclusion from his response serves to illustrate the nature of the arguments made by petitioner in his response. That conclusion is as follows:

> Conclusion
>
> In summary, because of the failure of the Secretary and the Commissioner to comply with the legal requirements imposed on federal agencies by the APA [Administrative Procedures Act], the ability of both to proceed adversely against American citizens appears very questionable. However, another explanation for the failure of these agencies to so comply with the APA is based upon the fact that both appear to have only an international jurisdiction. If they both had only this type of jurisdiction, then neither would publish the things mandated by the APA. When other data is considered such as the unpublished manuals or the I.R.S., it becomes quite evident that such jurisdiction is all that these agencies have. With such limited jurisdiction, neither have any authority to proceed adversely herein against the petitioner.

> The PRA [Paperwork Reduction Act] absolutely supports this view. All tax regulations and forms which demand information from anyone must bear and display O.M.B. control numbers. When all the tax regulations in part 602 which bear the same control number for Form 1040 are listed, one can see all the regulations which support the form. The PRA requires someone to only provide that information which has been approved by OMB as evidenced by the display of control numbers. When these regulations which have been approved are all analyzed, it is seen that the only information which anyone must provide is that relating to income derived from options, and the only citizens which must do so are those living in the insular possessions. This will remain the case until the Secretary and the Commissioner properly subject to the clearance process of the PRA all the other tax regulations in 26 C.F.R. For these reasons, the Respondent's Motion for Summary Judgment is due to be denied.

Petitioner accompanied his response with an affidavit in which he denies that he had admitted any facts and denies that he had any income derived from options. His affidavit further states that the regulation at section 1.6091-2, Income Tax Regs., has no O.M.B. control number and never has had one.

Petitioner's Cross Motion for Summary Judgment

On November 28, 1990, petitioner filed a motion for summary judgment styled "Petitioner's Cross Motion

for Summary Judgment." The judgment requested by petitioner is that respondent is not entitled to any additions to tax for fraud, negligence, or failure to file. Petitioner's motion is accompanied by a memorandum stating that petitioner's motion is supported by the same arguments made in his reply to respondent's motion for summary judgment. We will not again repeat those arguments.

Discussion

Respondent's Motion for Summary Judgment

Respondent's motion for summary judgment requests our determination that petitioner is liable for additions to tax for fraud or, in the alternative, negligence and failure to file. A summary adjudication is appropriate if the pleadings, any answers to interrogatories, depositions, admissions, or any other acceptable materials, together with affidavits (if any), show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. Rule 121(b). Partial summary adjudication may be made which does not dispose of all issues in the case. *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). As will be shown, here there is no genuine issue as to any material fact. There being no such genuine issue of fact, a decision may be rendered as a matter of law. Because we determine that petitioner is liable for additions to tax for fraud, we need not address respondent's alternative claims relating to negligence and failure to file. Our reasons for concluding there here there is no genuine issue as to any material fact are as follows.

The addition to tax for fraud is provided for in section 6653(b). The addition to tax for fraud is a civil sanction provided primarily for the protection of the revenue and to reimburse respondent for the heavy expense of investigation and the loss resulting from the

taxpayer's fraud. *Helvering v. Mitchell,* 303 U.S. 391, 401 (1938); *Brooks v. Commissioner,* 82 T.C. 413, 430-431 (1984), affd. without published opinion 772 F.2d 910 (9th Cir. 1985). Fraud is defined as an intentional wrongdoing designed to evade tax believed to be owing. *Moore v. United States,* 360 F.2d 353, 355 (4th Cir. 1965); *Powell v. Granquist,* 252 F.2d 56, 60 (9th Cir. 1958); *Mitchell v. Commissioner,* 118 F.2d 308, 310 (5th Cir. 1941); *Marshall v. Commissioner,* 85 T.C. 267, 272 (1985). Because petitioner has assigned error to respondent's determination of fraud, and because respondent has the burden of proof with regard to that issue, respondent affirmatively must plead fraud in his answer and support that pleading by showing the facts in support thereof on which he relies. Rule 36(b). *Doncaster v. Commissioner,* 77 T.C. 334, 336-338 (1981). Besides such adequate pleading, respondent has the burden of proving by clear and convincing evidence that some underpayment of tax occurred in each year in issue and that some portion of each underpayment was due to fraud with the intent to evade tax. Sec. 7454(a); Rule 142(b). We will discuss each of those elements in turn.

Adequacy of Pleading. In his answer, respondent clearly alleges fraud (paragraph 6am.-6ap.) and sets out the particulars thereof on which he relies (paragraph 6a.-6al.). Petitioner has not denied that such an allegation is made nor has he, by affidavit or otherwise, adequately (if at all) called into question the particulars thereof. Thus, we conclude that respondent has satisfied the requirements of Rule 36(b) that in his answer he both affirmatively plead fraud and include facts in support thereof on which he relies.

Existence of an Underpayment. Petitioner has failed to carry his burden of showing error in respondent's

determinations of deficiencies.[2] Petitioner's failure, however, does not equal respondent's success. See *Petzoldt v. Commissioner*, 92 T.C. 661, 700 (1989) ("Respondent cannot rely on the taxpayer's failure to prove error in respondent's determination to meet his burden of proving fraud.") Respondent must, as stated above, by clear and convincing evidence, show some underpayment for each year in issue. Pursuant to Rule 37(c), the allegations of fact set forth in paragraph 6 of respondent's answer have been deemed admitted. Petitioner has not, by affidavit or otherwise, overcome those deemed admissions. Those deemed admissions clearly and convincingly show underpayments for each year in issue. See, generally, paragraphs 6f.-6am. and, in particular, paragraph 6ao. Where deemed admissions clearly and convincingly establish fraud, we have found that sufficient to satisfy respondent's burden and have not required respondent to present affirmative evidence of fraud independent of the deemed admissions. See *Marshall v. Commissioner*, 85 T.C. 267, 272-273 (1985); *Doncaster v. Commissioner, supra.*

Underpayments Due to Fraud. The deemed admissions also satisfy respondent's burden of proof that, by clear and convincing evidence, some portion of each underpayment is due to fraud. See, generally, paragraphs 6f.-6al. and, in particular paragraphs 6am. - 6ap. Among other recognized indicia of fraud, the deemed admissions establish the following: (1) that petitioner willfully failed to maintain or to supply respondent's revenue agent with books and records pertaining to his income for the years in issue (see paragraphs p. and q.); (2) that petitioner

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[2] This Court previously has granted respondent's motion to dismiss as to all issues with regard to which petitioner has the burden of proof, thus, in effect, upholding respondent's determinations of deficiencies.

fraudulently concealed assets by placing them in trust under fictitious names (see paragraphs ai., ak., and al.); (3) that petitioner failed to file returns reporting income (see paragraphs f. and am.); and (4) that petitioner willfully caused his corporation to file returns which failed to reflect compensation paid to him (see paragraphs x.-af. and aj.). See *Bradford v. Commissioner*, 796 F.2d 303, 307-308 (9th Cir. 1986), affg. a Memorandum Opinion of this Court. As with regard to establishing petitioner's underpayments, respondent need not present affirmative evidence (exclusive of the admissions) that some portion of each underpayment is due to fraud where the deemed admissions clearly and convincingly establish that proposition. See *Marshall v. Commissioner, supra,* and *Doncaster v. Commissioner, supra.*

As stated above, for us to grant respondent's motion for summary judgment, we must determine that, based on the pleadings, affidavits, and other acceptable documents, there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. We have analyzed the elements necessary here to establish fraud and, with regard to each, have found either that respondent has adequately plead that element or has met his burden of proof, as appropriate. In doing so, we have considered not only petitioner's affidavit but also his reply to respondent's motion for summary judgment and the other documents and pleading submitted by petitioner. Having thus separately considered the elements necessary here to establish fraud, we are able to conclude that respondent has carried his burden of proof with regard to the additions to tax for fraud. There are no genuine issues as to any material facts. Respondent is entitled, as a matter of law, to a decision so providing.

Petitioner's Motion for Summary Judgment

Petitioner's motion for summary judgment requests our determination that petitioner is not liable for additions to tax for fraud, negligence, or failure to file. The reasons that support our granting respondent's motion equally support our denying petitioner's motion, and we will so deny it.

Motion for Imposition of a Penalty under Section 6673.

Respondent has by motion asked that we impose upon petitioner the penalty provided for in section 6673. Section 6673 provides in relevant part that:

> Whenever it appears to the Tax Court that-
>
> (A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,
>
> (B) the taxpayer's position in such proceeding is frivolous or groundless, or
>
> (C) the taxpayer unreasonably failed to pursue available administrative remedies,
>
> the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.

Respondent has asked that we impose that penalty in its maximum amount, viz, $25,000.

We conclude based on the record in this case that petitioner's position in this proceeding is both frivolous and groundless and that this proceeding was instituted by him primarily for delay. While we are normally reluctant to impose a penalty under section 6673 in fraud cases, the record in this case establishes that petitioner has had no interest in disputing either the deficiencies or additions to tax determined by respondent. Petitioner has never

addressed the substantive issues in this case, which relate to the correct determination of his income and deductions for the years in issue and various additions to tax. Instead, petitioner has, among other tax-protestor arguments, asserted that, although born in the State of Maryland, a citizen of that State during the taxable years here in issue, and deriving income from sources within the jurisdiction of that State, he had no income derived from any source within the taxing jurisdiction of the United States. Petitioner also has argued that, for failure of certain Treasury regulations to display O.M.B. control numbers, the only information that anyone must provide on a tax return is information relating to income derived from options, and the only citizens who must do so are those living in insular possessions. Such assertions involve frivolous, discredited, and meritless issues that have resulted in a needless delay in this proceeding, and the unwarranted waste of valuable governmental and judicial resources. We are fully justified in imposing the penalty provided for in section 6673. See *Derksen v. Commissioner*, 84 T.C. 355 (1985); *Abrams v. Commissioner*, 82 T.C. 403 (1984); *Marryat v. Commissioner*, T.C. Memo 1990-438; *Ladika v. Commissioner*, T.C. Memo 1989-258, affd. 889 F.2d 1225 (9th Cir. 1990); *Bowers v. Commissioner*, T.C. Memo. 1986-271. Accordingly, petitioner is required to pay to the United States a penalty in the amount of $25,000.

To reflect the foregoing,

An appropriate order and decision will be entered.